

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

NANCY L. JAMES, Chapter 7 Trustee

Plaintiff,

v.

JAMES C. PATON, *et al.*,

Defendants.

Civil Case No. C15-1914RSL

ORDER GRANTING TRUSTEE'S  
MOTION FOR SUMMARY  
JUDGMENT REGARDING JOINT  
COST ALLOCATION

This matter comes before the Court on the “Trustee’s Motion for Partial Summary Judgment Regarding Joint Cost Allocation” (Dkt. # 253) and defendant Clark Nuber’s cross-motion on the same issue (Dkt. # 273).<sup>1</sup> Plaintiff, the bankruptcy trustee, seeks a summary determination that the debtor Breast Cancer Prevention Fund (“BCPF”) improperly used joint cost allocation under Statement of Position (“SOP”) 98-2 of the American Institute of Certified Public Accountants.<sup>2</sup> Defendants maintain that this issue cannot be resolved without expert testimony and that the trustee’s failure to offer an expert’s opinion regarding the application of

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<sup>1</sup> The Court declines to strike Clark Nuber’s cross-motion or to impose sanctions for its filing. The Court has the power to grant judgment for a non-moving party if the papers submitted show that there is no genuine issue of fact and that the law favors the non-movant. Clark Nuber’s explicit request for the relief authorized in Fed. R. Civ. P. 56(f) in the context of its opposition papers is not sanctionable.

<sup>2</sup> SOP 98-2 is now known as ASC 958-720.

1 SOP 98-2 to the facts of this case compels entry of judgment in defendants' favor.

2 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
3 the nonmoving party, there is no genuine dispute as to any material fact that would preclude the  
4 entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears  
5 the initial responsibility of informing the district court of the basis for its motion" (Celotex Corp.  
6 v. Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials in the record"  
7 that show the absence of a genuine dispute as to any material fact (Fed. R. Civ. P. 56(c)). Once  
8 the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving  
9 party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex  
10 Corp., 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the  
11 nonmoving party . . . and draw all reasonable inferences in that party's favor." Krechman v.  
12 County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for  
13 the jury genuine issues regarding credibility, the weight of the evidence, and legitimate  
14 inferences, the "mere existence of a scintilla of evidence in support of the non-moving party's  
15 position will be insufficient" to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750  
16 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).  
17 Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the  
18 consideration of a motion for summary judgment. S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921,  
19 925 (9th Cir. 2014). In other words, summary judgment should be granted where the nonmoving  
20 party fails to offer evidence from which a reasonable jury could return a verdict in its favor.  
21 FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

22 Having reviewed the memoranda, declarations, and exhibits submitted by the parties,<sup>3</sup> and  
23 taking the evidence in the light most favorable to defendants, the Court finds as follows:

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25 <sup>3</sup> The requests to strike are denied.

1 Defendant James C. Paton founded defendant Legacy Telemarketing Corporation in 1992  
2 to provide telemarketing services to both non-profit and for-profit companies. In 2004, Paton  
3 incorporated BCPF as a not-for-profit organization. BCPF contracted with Legacy to perform  
4 certain program and fundraising activities. BCPF retained Clark Nuber, a certified public  
5 accounting firm, to complete its tax returns for the 2005-2011 tax years and to conduct audits in  
6 2009-2011. Because the services Legacy rendered included both educational/mission-oriented  
7 communications and a fundraising solicitation, BCPF, in consultation with Clark Nuber, had to  
8 determine whether there was a reasonable method by which it could allocate the fees paid to  
9 Legacy between bona fide non-fundraising exempt purposes and fundraising. Joint costs – those  
10 incurred in a combined educational campaign and fundraising solicitation – cannot be allocated  
11 to program service expenses unless the charitable organization follows SOP 98-2.

12 In order to qualify as a joint cost that is eligible for allocation, the purpose of the activity  
13 must, at least in part, further the charity's mission and not just raise funds. SOP 98-2 at ¶¶ .08.  
14 The Court will assume for purposes of this motion that Legacy's telemarketing script included a  
15 call for specific action by the audience that would help accomplish BCPF's mission, thereby  
16 satisfying the first part of the "purpose" criteria. SOP 98-2 at ¶ .09. The issue, however, is  
17 whether the BCPF-Legacy relationship satisfies the factors set forth in SOP 98-2 at ¶ .10. The  
18 first factor, which is identified as the "preeminent guidance," states "[t]he purpose criterion is  
19 *not* met if a majority of compensation or fees for any party's performance of any component of  
20 the discrete joint activity varies based on contributions raised for that discrete joint activity."  
21 SOP 98-2 at ¶ .10a (emphasis in original). The parties disagree as to whether this factor is  
22 satisfied.

23 Legacy's contract with BCPF specified that Legacy would bill BCPF for services  
24 rendered at rates set forth in a "Marketing Services Agreement PART II." Dkt. # 271-4 at 8. If  
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1 this were a standard times and materials contract, the BCPF-Legacy agreement would  
2 undoubtedly satisfy ¶ .10a because Legacy's compensation would not vary with or be influenced  
3 by the amount of contributions raised. The contract further states, however, that regardless of the  
4 amount of time and materials spent in a given month, Legacy was entitled to collect no more  
5 than 80% of the funds raised in that month. The contract authorized Legacy to carry forward any  
6 unpaid balance in the hopes of recouping it in the future when costs were less than normal and/or  
7 contributions were more than normal. Footnote 6 of SOP 98-2 addresses this situation:

8       Some compensation contracts provide that compensation for performing the  
9       activity is based on a factor other than contributions raised, but not to exceed a  
10       specified portion of contributions raised. For example, a contract may provide that  
11       compensation for performing the activity is \$10 per contact hour, but not to exceed  
12       60 percent of contributions raised. In such circumstances, compensation is not  
13       considered based on amounts raised, unless the stated maximum percentage is met.  
14       In circumstances in which it is not yet known whether the stated maximum  
15       percentage is met, compensation is not considered based on amounts raised, unless  
16       it is probable that the stated maximum percentage will be met.

17       The question is, therefore, whether the stated maximum percentage was actually met or would  
18       probably be met in the BCPF-Legacy arrangement. While this could be an issue of fact in certain  
19       circumstances, the answer is not reasonably in dispute in this case. In every month of their  
20       relationship, right up until the time that BCPF attempted to termination the agreement, Legacy  
21       was paid 80% of the amount of contributions raised. Dkt. # 272-1 and # 272-2. The 80%  
22       maximum was, as a matter of fact, met in every month of each preceding tax year. In these  
23       circumstances, Legacy's compensation is deemed based on amounts raised under SOP 98-2 at  
24       ¶ .10a.

25       Defendants highlight the carryover provision, arguing that because Legacy had a claim to  
26       additional funds (over the 80%) that increased and decreased over time, its compensation was  
27       not based on the success of its fundraising efforts. This argument is illogical and unpersuasive.

1 First, SOP 98-2 provides guidance on how to evaluate and characterize the many creative  
2 payment arrangements parties may use in an effort to claim fundraising expenses as program  
3 expenses. No matter how detailed the time and materials list or how complicated the invoicing, if  
4 the end result is that the stated maximum percentage is or probably will be met, Legacy's  
5 compensation is deemed to be based on the contributions it raised and the purpose criterion is  
6 not satisfied. The carryover provision in no way changes this fundamental reality or the  
7 application of SOP 98-2 to the facts of this case. Second, the carryover provision did not, from  
8 September 2005 until the second version of the contract was signed in March 2011, entitle  
9 Legacy to recover more than 80% of contributions at some future date. The initial contract  
10 makes clear that BCPF will receive no less than 20% of the contributions raised in a given  
11 month and that Legacy's share "may never exceed 80%." Dkt. # 271-4 at 4 and 8. There was no  
12 termination or adjustment provision that would allow Legacy to recover carried over costs that  
13 exceed the 80% maximum.<sup>4</sup> Finally, the carryover provision's real world effect – both before  
14 and after the March 2011 revision – was to allow Legacy to spread costs over time so that, even  
15 if there were a month in which the 80% maximum would not have been reached, Legacy's  
16 carried over costs would entitle it to the full 80%. While there was a moment in time at the  
17 beginning of the relationship where one might not be able to predict with any degree of  
18 confidence whether Legacy's payment would reach the 80% maximum on a regular basis, as  
19 soon as Legacy ran up a "deferred balance" of over \$170,000 in the first month, it was at least  
20 "probable that the stated maximum percentage w[ould] be met" thereafter. And, in fact, it was.  
21 Thus, the carryover provision on which defendants rely actually increased the chances that the  
22 compensation arrangement would not satisfy the purpose criterion of SOP 98-2.

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24 <sup>4</sup> A new provision was added to the March 2011 contract that allowed Legacy to recover any  
25 deferred amounts due from future donations if BCPF terminated the contract, regardless of whether the  
recovery would increase Legacy's percentage above 80%. Dkt. # 255-1 at 56.

1 Defendants argue that the trustee is not entitled to summary judgment on the issue of  
2 whether BCPF was entitled to utilize joint cost allocation because she has not provided a  
3 supporting expert opinion and because their experts have opined that, for example, they “do not  
4 view this [BCPF-Legacy] contract as prohibiting joint cost allocation pursuant to SOP 98-2.”  
5 Dkt. # 271-1 at 49.<sup>5</sup> It is not clear what issue requires professional training or expertise in this  
6 instance. The language of SOP 98-2 is not ambiguous or technical. Judges regularly interpret  
7 contracts, statutes, regulations, and guidelines using common rules of construction. Recourse to  
8 an expert is rarely, if ever, necessary. As the above discussion shows, SOP 98-2 includes  
9 standard, non-technical words with well-accepted, ordinary meanings. Even if expert testimony  
10 will be necessary to establish the standard of care that governed Clark Nuber’s evaluation of the  
11 joint cost allocation issue (*i.e.*, what investigations and actions Clark Nuber should have  
12 undertaken when deciding whether joint cost allocation could be used), the application of the  
13 guideline to the facts of this case does not require any specialized training, education, or  
14 experience.

15 In his latest declaration, Michael G. Ueltzen, Clark Nuber’s expert, opines that the last  
16 sentence of SOP 98-2, fn. 6 requires “an assessment of the ‘compensation contract’ by an  
17 auditor, who is licensed to use professional judgment as a CPA by the state in which the audit is  
18 performed, as to whether ‘it is probable the stated maximum percentage would be met’ under all  
19 the terms of the ‘compensation contract.’” Dkt. # 274 at ¶ 14. There is no linguistic or contextual  
20 support for such a “requirement,” nor would it further the purposes of the SOP. The undisputed  
21 facts of this case are that BCPF paid Legacy 80% of the contributions raised in every month of  
22 each tax year for which Clark Nuber filed returns and that, at any given moment, Legacy had

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24 <sup>5</sup> Of course, the IRS examiner agrees with the trustee’s position, finding that the BCPF-Legacy  
25 contract provided compensation at a specified portion of the contributions raised and therefore failed the  
26 purpose criterion. Dkt. # 271-2 at 24.

1 built up a reservoir of carried over costs that made it highly unlikely that the maximum  
2 percentage would not be reached, both as a matter of historic charges and projected balances. By  
3 any definition of the word “probable,” a near certainty qualifies. Thus, the contract ran afoul of  
4 both “unless” clauses in Footnote 6 and the Court can, as a matter of law and without the aid of  
5 expert testimony, conclude that the purpose criterion was not met. SOP 98-2, n.7. BCPF was  
6 therefore not entitled to use joint cost allocation. Mr. Ueltzen’s expertise may be called upon to  
7 explain why Clark Nuber should not have been expected to know this, but the trustee has not  
8 sought a finding of negligence at this point.

9 Finally, the Paton defendants raise a one sentence objection to the entry of summary  
10 judgment on the ground that the trustee has failed to specify with particularity the claim or  
11 defense to which BCPF’s use of joint cost allocation pertains. The importance of this issue is  
12 obvious and has been recognized by the parties since the first motions were filed. The trustee  
13 intends to prove that BCPF utilized joint cost allocation to mislead regulators, taxing authorities,  
14 and donors regarding the percentage of donations that went towards program services and that  
15 Clark Nuber’s use of joint cost allocation in preparing BCPF’s tax returns constituted a breach of  
16 the duty of reasonable care, gross negligence, and a misrepresentation to the IRS. A ruling on  
17 this issue moves each of these claims further toward resolution.

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1 For all of the foregoing reasons, plaintiff's motion for summary judgment (Dkt. # 253) is  
2 GRANTED. The Court finds that BCPF was not entitled to utilize joint cost allocation during the  
3 relevant time frame. Defendant Clark Nuber's cross motion for summary judgment (Dkt. # 273)  
4 is DENIED.

5 Dated this 25th day of January, 2017.

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8 Robert S. Lasnik  
9 United States District Judge  
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